IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.828 OF 1990

The State of Maharashtra : Appellant

versus

1. Nitin Pandharinath Bhoi]
   Age about 25 years.]
2. Pandharinath Babulnath Bhoi] Respondents.
   Age about 60 years.] (Org.Accused
   Both residing at Mahagiri,] Nos.1 and 2.)
   Koliwada, Thane Dist.Thane]

Mr.V.B.Konde-Deshmukh, APP, for the State.

Mr.R.S.Apte, Advocate for the Respondents.

CORAM : D.G.DESHPANDE

S.R.SATHE, JJ.

DATED : MARCH 08, 2007.

JUDGMENT : [PER D.G.DESHPANDE,J]

1. This appeal is filed by the State against

the judgment of acquittal of both the accused/respondents from the offence under Sections 451, 302 re/w 34 of the Indian Penal Code. The judgment was delivered by the IV Additional Sessions Judge, Thane on 30th July 1990. We heard learned APP Mr.Konde-Deshmukh for the State and learned advocate Mr.Apte for the respondents.

2. Deceased in this case is Bhagatsingh. Both the accused and the deceased were Bhaubands or close relatives. They were residing in one and the same house. Bhagatsingh was residing on the first floor while the accused were residing on the ground floor in the same house. There were disputes between the accused and the deceased regarding ownership of the said house and the Civil Suits were pending.

3. The incident took place on 1.10.1985 at about 12.30 noon. Though the deceased was residing on the first floor, the entry to the first floor was by the stair case which was on the ground floor itself. In other words, if the deceased wanted to go to his first floor, he was required to go through the inside portion in

occupation of the accused and then by the stair case to the first floor. At about 12.30 noon, the deceased came to his house and while he was near the stair case, there was an altercation between him and accused No.1. The deceased, thereafter went to the first floor. He was followed by accused Nos. 1 and 2, and it is alleged by the prosecution that both of them caught hold of the legs of the deceased and threw him from the window of first floor of the house. Deceased Bhagatsingh fell on the ground. There were stones below the window. He received head injuries.

4. Sunita, the daughter of deceased, was residing in the neighbourhood i.e. at a distance of 10 to 15 ft. The deceased gave a call to her when he was felling down. She, therefore, came there and she saw the accused No.1 throwing the deceased from the window. She went to her paternal aunt and came back. Then Sunita also called her mother. But in the mean time the sister of deceased came there, who was also residing in the neighbourhood, and the deceased told her that the accused threw him from the window to the ground floor.

5. When the wife of the deceased came, she removed the deceased to the hospital. The prosecution also alleged that the accused were knowing that the stones were lying below the window and, therefore, the deceased was thrown from or pushed through the window with an intention to kill.

6. In the hospital, a Head Constable was present. The deceased was alive when he was admitted. The head constable called the doctor, obtained his opinion and endorsement about the physical fitness of the deceased to give statement and, in presence of doctor, the head constable recorded the statement of deceased at 5.00 p.m. Then offence under Section 324 of the Indian Penal Code was registered. Since the condition of deceased Bhagatsingh became serious, he was removed to J.J.Hospital, Bombay. On 5.10.1985 Bhagatsingh succumbed to the injuries. The cause of death given in the post mortem was, "Head injury with multiple fractures".

7. During the course of investigation, the stones were seized; statements were recorded and

charge sheet came to be filed. The witnesses, named above, were examined. But the trial Court did not believe the prosecution case and acquitted the accused. Hence this appeal.

8. The learned APP Mr.Konde-Deshmukh for the State vehemently urged that the judgment of the trial Court is perverse as no satisfactory explanation or reasoning is given by the trial Court for rejecting the dying declaration recorded by the head constable and the oral dying declaration made by deceased Bhagatsingh to his sister. The learned APP also pointed out that the trial Court has come to the conclusion that when it was a homicidal death, then the appreciation of evidence of other witnesses was totally wrong. Our attention was drawn to para 17 where the trial Court has tried to find distinction between word "throw" and "pushed". The learned APP contended that what was necessary was to find out the nature of act and its consequent effect and it was not proper to enter into such jugglery of words.

9. On the other hand, the learned advocate Mr.Apte, appearing for the accused, contended

that the judgment of acquittal is not at all perverse and, out of the two views available, the view adopted by the trial Court is reasonable and, therefore, this Court should not interfere with the judgment. Mr.Apte also contended that admittedly, there was no eye witness to the incident and the case was based on circumstantial evidence and all the links in the chain of circumstantial evidence were not established and, therefore, the acquittal of the accused was perfectly justified.

10. The prosecution has examined in all ten witness. P.W.1 is Sunita Ganesh Bhoir. She is the daughter of deceased Bhagatsingh. She has stated that her house was situated at a distance of about 20 to 15 ft. away from the house of her father; that she was residing with her husband and two children; that her father was residing on the first floor and the accused were residing on the ground floor. She has further stated that there was a stair case on the ground floor by which her father used to go to the first floor. She also stated that there was dispute over the ownership between her father and the accused since three years prior to the date of incident.

11. Sunita (PW.1) further stated that at about 12.30 p.m. on 1.10.1985 she was present in her house. At that time she heard noise of her father calling Sunita. She, therefore, went to his house and saw the accused No.1 Nitin catching hold of two legs of her father and throwing him through the window on the ground floor from the first floor. There were stones on the ground. The father fell down on the ground and received injuries to his head. She went near her father and found that he had received bleeding injuries. Then she went to the house of one Rajaram for bringing water, gave it to her father and, then she called Manisha, the sister of her father. Sunita (PW 1) narrated to Manisha that she saw the accused Nitin catching hold of legs of father and throwing him on the ground. Thereafter the mother was called and the father was taken to the civil hospital in auto rickshaw and then to the J.J.Hospital, Bombay where he died on 5.10.85. According to Sunita (PW 1), the window, through which the father was thrown, was a wooden window; half of the window had wooden rifts and remaining half portion was open. Size of the window was 2 ft. x 4 ft. Then in the cross examination she

has admitted that her father used to consume alcohol since morning and lying on the ground by the side of his house sometimes. She also admitted that on 1.10.85, i.e. on the date of death, her father attended last ritual ceremony of brother of one Pandu Shet and came back between 9 or 9.30 p.m. after consuming alcohol. She also stated that the clothes of her father, after he fell down, had blood stains. She further stated that her father was conscious and was talking till he was taken to Civil Hospital, Thane. She denied the suggestion that she was deposing falsely against accused No.1.

12. The next witness is P.W.2 Manisha Mestry - the sister of deceased Bhagatsingh. She has stated that on 1.10.85 she was present in her house when at about 12.15 p.m., i.e. in the afternoon, she heard noise of quarrel of her brother Bhagatsingh and accused No.1 Nitin. But she did not pay any heed to it because it was their usual affair. Then she heard noise of her brother Bhagatsingh when he was calling Sunita. Then Sunita came to her house after some time and told her that accused No.1 threw her father through window. Then both of them went to the

spot. Some persons had assembled there. Bhagatsingh had received bleeding injuries to his head and was lying under the window i.e. on the ground under the window. Some stones were there. Then she brought ice and tried to stop the blood. Then she advised Sunita to call the mother and at that time Bhagatsingh told her that when he was going to his house through the stair case, at that time he pushed son of accused Nitin and, therefore, accused No.1 Nitin got annoyed, came on the first floor and threw him on the ground through window. Then thereafter Bhagatsingh was shifted to civil hospital through auto rickshaw and he died on 5.10.85.

13. P.W.2 Manisha candidly admitted that when Bhagatsingh gave this dying declaration, Sunita was not present and no other person was present.

14. The next witness relied upon by the prosecution is PW.4 - Dr.Vijay Sangole. He has stated that he examined Bhagat Bhoir at about 1.30 p.m. on 1.10.85 and he found following things :-

1. Patient was conscious, there was smell of

alcoholic;

2. Contused lacerated wound over the frontal region. 2-1/2" x 1/2" bonedeep;

3. There was contusion and swelling over the left memory region;

4. The squary (suspected) fractures of ribs.

According to the doctor, the injuries were fresh and they were possible if a person falls from the height at about 18 ft from the ground having stones on the ground. A suggestion was given to the doctor to the effect that if a person under influence of liquor falls on the ground at a distance of 3/4 ft. height, then such injuries are possible. This suggestion was completely denied by the doctor. The doctor again stated that the fracture of vertebra cannot be possible if a person falls on a ground from the height of about 3/4 ft. on the ground and the minimum height for such fracture should be 8 to 10 ft.

15. The most important witness of the prosecution is P.W. 5 PSI Ravsaheb Pawar who

recorded the dying declaration of deceased Bhagatsingh. He has stated that he inquired with the medical officer whether the injured Bhagat Bhoir was conscious and was in a position to give a statement or not. The medical officer told him that he was conscious and could give statement and, thereafter he recorded the statement at Exhibit-13, upon which Bhagatsingh put his signature, so also the medical officer put his endorsement. In this statement (Exh.13) the deceased has stated that on that day at 9 'O' clock he consumed liquor and returned home. At 10 'O' clock in the morning accused Nitin came there. There was hot exchange of words and abuses between them and then Nitin caught hold of him, took him to the window and pushed him down from the window. He fell down and his fore-head hit the stones, he became unconscious, his wife came at 12.30 and brought him to the civil hospital. Bhagatsingh also told that it was on account of dispute over the partition of house.

16. P.W.5 PSI Pawar then registered the FIR (Exhibit 14). On the basis of this statement, he was subjected to cross examination wherein he has stated that he met Bhagatsingh Bhoir at 4.30 p.m.

and recorded his statement at 5 p.m. The medical officer was present when the statement was being recorded, but the wife of Bhagatsingh was not present. He denied the suggestion that he had seen Bhagatsingh at 1.00 p.m. and at that time Bhagatsingh was not in a position to give any statement.

17. This is the important evidence of the prosecution in addition to the panchanama Exhibit-18 which has described the window through which deceased Bhagatsigh was pushed as, a window of 4′ x 2-1/2′ having wooden rod fixed at about 2 feet from the bottom with vertical wooden battens and the height of this window from the ground level, noted in this panchanama, is 13 ft.

18. Regarding this evidence of prosecution, learned advocate Mr.Apte for the accused contended that the trial Court has rightly disbelieved this evidence firstly because if the dying declaration (Exhibit 13) is accepted, then it falsifies the story of daughter and sister that they went there and lifted him with the help of mother. It was also contended by him that there is no mention of Manisha or Sunita in the

dying declaration (Exh.13). It is true that there is no reference of Sunita or Manisha in the dying declaration Exhibit 13. It is true that the deceased was under the influence of liquor or had consumed liquor. But the defence suggestion that he fell from the height of 3 to 4 ft and sustained injuries has got to be rejected because the medical evidence does not support this defence. The doctor has clearly denied those suggestions and ruled out any such possibility.

19. The trial Court has considered the evidence of Sunita and Manisha minutely but did not find it worthy of credence. It may be that there are certain exaggeration in the evidence of Sunita and Manisha but the fact that Sunita was living in close to the house of father so also Manisha and it is most likely that the deceased gave a call to Sunita for help while he was felling down and she came there. Admission by Manisha that when Bhagatsingh made the dying declaration to her none-else was present also inspire confidence about the truthfulness of the witnesses.

20. However, according to us, the most important piece of evidence tendered by the prosecution is the dying declaration (Exh.13) recorded by the PSI. The trial Court found that it was not recorded by the Executive Magistrate but recorded by the police officer. It is in the narrative form and recorded 5 hours after the incident before which the deceased was seen by his wife, Sunita and Manisha and most importantly the trial Court felt that the deceased was not expecting then death when such a dying declaration was recorded. These findings of the trial Court are totally perverse. If a man falls on the ground from a height of more than 13 ft. on a stony surface and receives injuries to his head, as stated above, then it cannot be said that he made statement when he was not in expectation of death. In the post mortem report what is noted is "Head injury with multiple fractures". So called delay of five hours is absolutely no delay in the circumstances and even if Bhagatsingh was visited by his wife, daughter and sister, there was no reason for anybody to falsely implicate the accused.

21. It is this dying declaration Exhibit 13

which gives credibility to the evidence of Manisha (PW 2) about the oral dying declaration made to her by the deceased. The other important factor is that the deceased did not try to implicate accused No.2 and Manisha also did not try to implicate accused No.2. The role is attributed to Accused No.1 Nitin alone. The advocate for the accused tried to contend that the window was so small that it would not have been possible for one single individual to push the deceased. Admittedly, this is not a case of suicide. Nobody has suggested that theory to any of the prosecution witnesses. There are no reasons for Bhagatsingh to commit suicide. The Panchanama (Exhibit 18) describes that half of the window was semiclosed because of wooden rod fixed to it. Therefore, this cannot be treated a case of accidental fall. This is a case of homicidal and homicidal only. If there is a murder, there has to be somebody to commit murder and, the dying declaration (Exhibit 13) and the evidence of Manisha (PW 2) prove the case against accused No.1 Nitin. The judgment of the trial Court is perverse. The view adopted by the trial Court is not reasonable view. The crucial aspects of the matter were not at all considered

by the trial Court and ultimately it has come to a wrong conclusion. Therefore, this appeal of the State against acquittal has to be allowed so far as it relates to Accused No.1 Nitin. Acquittal of accused No.2 Pandharinath is required to be upheld. Therefore, We pass the following order:-

:ORDER:

The Appeal filed by the State is partly allowed.

The order of acquittal passed against the Accused No.2 for the offence under Section 302 read with 34 of IPC is upheld.

However, the order of acquittal passed against the Accused No.1 for the offence under Section 302 of IPC is set aside and he is convicted for the offence punishable under Section 302 of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- in default to suffer R.I. for one year.

Both the accused are on bail. Bail bond of Accused No.2 stands cancelled.

Accused No.1 to surrender before the trial Court within four weeks from today failing which the trial Court to take necessary steps to arrest the said accused and send him to jail to undergo the sentence mentioned above.

[D.G.DESHPANDE,J]

[S.R.SATHE, J]